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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents Anderson, Bell, Clark, Satchel, and Truelock (hereinafter "respondents") contend (Br. in Opp. 85-88) that a number of court of appeals' decisions support the holding of the court below that respondents are entitled to recover interim attorneys' fees as "prevailing parties" within the meaning of 42 U.S.C. 1988.

Of the cases cited, only two from the Ninth Circuit—a 1977 district court decision and a 1972 appellate decision in which fees were awarded without discussion—support respondents' position.[1] However, the Ninth Circuit's

[1] *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779 (9th Cir. 1972); *Chandler* v. *Roudebush*, 13 Empl. Prac. Dec. para. 11,574 (C.D. Cal. 1977). It is unclear whether the fee award in *Malone* was even contested, since the court simply announced that the award would be made pursuant to the fee provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), "[u]nder the particular circumstances of this case" and stated that the amount awarded had been

decision in *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979), makes clear that those cases are no longer good law. In *Chinese for Affirmative Action*, the court of appeals held that plaintiffs were not entitled to a fee award under the attorneys' fees provision of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973*l*(e), because although they had prevailed on the appeal, "[n]o issue on the merits has been finally determined in favor of any party" (580 F. 2d at 1009).[2]

"stipulated to as reasonable by North American's counsel." 457 F. 2d at 781. Respondents' statement (Br. in Opp. 86 n.*) that *Malone* was "cited with approval" in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), is misleading because *Georgia Highway Express* concerned the amount of attorney fees awarded, not whether the plaintiffs were prevailing parties.

Another Ninth Circuit case, *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131 (9th Cir. 1974), on which respondents rely (Br. in Opp. 86), is inapposite, even assuming it is still good law after *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). In that retaliatory firing suit, brought by an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Equal Employment Opportunity Commission sought to file a complaint in intervention that both supported the plaintiff's unlawful discharge claim and would have broadened the suit to include a challenge to the defendant's allegedly discriminatory hiring practices. The district court rejected EEOC's effort to broaden the suit, limiting its intervention to the issue of retaliation. On EEOC's appeal, the Ninth Circuit affirmed the district court and awarded the defendant attorneys' fees connected with the appeal. Although the order affirmed was technically interlocutory, it finally determined the issue of the defendant's liability in that action on the proposed hiring practices allegations. Respondents in the present case—having won merely the right, as plaintiffs, to a new trial on their allegations—are clearly not in the same position as the defendant in *Van Hoomissen*.

[2]As we noted in our petition (Pet. 24), the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, which added the fee provision to 42 U.S.C. 1988, was expressly patterned on, *inter alia*, 42 U.S.C. 1973*l*(e).

In each of the other cases cited by respondents, the fee awards were made because plaintiffs had prevailed by obtaining all or part of the relief sought in their complaints through settlements of varying degrees of formality,[3] through unilateral action of the defendants, induced by the filing of the lawsuit,[4] or through actual court rulings for plaintiffs on the merits of some of their claims.[5]

Respondents' circumstances in the present case in no way resemble those of the parties found to have prevailed in the cases cited above. In their amended complaint respondents seek to recover some $21 million in damages for alleged constitutional violations in connection with the December 4, 1969, search of the Fred Hampton apartment and the related shootings, arrests, prosecutions, and official investigations. Respondents

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[3]*Dawson* v. *Pastrick*, 600 F. 2d 70, 78 (7th Cir. 1979); *Brown* v. *Culpepper*, 559 F. 2d 274, 277 (5th Cir. 1977); *Parker* v. *Matthews*, 411 F. Supp. 1059, 1062-1063 (D. D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977).

[4]*Ross* v. *Horn*, 598 F. 2d 1312, 1322 (3d Cir. 1979); *Fogg* v. *New England Telephone & Telegraph Co.*, 346 F. Supp. 645 (D. N.H. 1972). The First Circuit has since held, however, that it must be shown that the lawsuit, and not some other factor, prompted defendants to grant (in whole or in part) the relief sought in the complaint. *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279-281 (1st Cir. 1978).

[5]*Bagby* v. *Beal*, 606 F. 2d 411 (3d Cir. 1979) (plaintiff prevailed in district court on claims of entitlement to an administrative hearing and expungement of derogatory information from publicly available personnel record); *Nadeau* v. *Helgemoe*, *supra*, 581 F. 2d 279 (access to library facilities); *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881 (5th Cir. 1977) (class discrimination claims); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970) (class discrimination claims). See also *Gagne* v. *Maher*, 594 F. 2d 336 (2d Cir. 1979), cert. granted, No. 78-1888 (Oct. 1, 1979); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34 (2d Cir. 1978).

have not yet proven any of these claims, much less received damages or injunctive relief. To support their "prevailing parties" conclusion, however, respondents (Br. in Opp. 85, 87) and the court of appeals (order of December 12, 1979, slip op. 3),[6] assert that respondents

[6]In a supplemental opinion issued on December 12, 1979 (as amended December 21, 1979), fixing the amount of the fee award, the court of appeals reiterated its conclusion that respondents are "prevailing parties" within the meaning of 42 U.S.C. 1988 and sought to explain its decision on this question in the passage set out in respondents' brief in opposition (Br. in Opp. 84).

In addition, the court of appeals held (slip op. 13) that the fee award for work on the appeal, which totalled approximately $100,000 (slip op. 2), should be apportioned among the defendants, with one-third to be paid by the federal defendants (petitioners herein) and two-thirds by the state defendants. Perhaps realizing the harshness of its imposition of a fee award at this stage of the litigation, the court made the following observations on the source of payment (slip op. 13; footnote omitted):

> Defendants argue that any fee award would have to be collected from them in their official capacity, rather than in their personal capacities, in the absence of a finding of bad faith. We agree with defendants' position. It is supported by both the decision of the Supreme Court in *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978) and the legislative intent of 42 U.S.C. § 1988. But see *McNamara* v. *Moody*, No. 77-2466, slip op. at 1199-1201 (5th Cir. Nov. 15, 1979). The defendants in this case were sued in their official capacities and have been represented by government attorneys.

Because the federal defendants had not argued that the fees "would have to be collected from them in their official capacity," it is not clear that the court's remarks were meant to apply to them. Nevertheless, the United States, represented by Department of Justice attorneys other than those representing petitioners, has intervened in the court of appeals and filed a petition for rehearing en banc, contending that sovereign immunity bars an attorneys' fee award against the United States, which was not a party to the case. Because the United States sought en banc consideration of its petition, and because an order issued by the court of appeals on September 17, 1979, had stated that the panel would rule on defendants' objections to plaintiffs' specific fee claims without prejudice to defendants' right

succeeded on appeal in winning the right to have their claims retried before a jury, to learn the identity of an informant (a matter related to proof of one of their Fourth Amendment claims but not in itself a claim for relief), to seek additional discovery, and to obtain a hearing before the district court on their contention that the response of petitioners (the federal defendants) and their trial counsel to certain discovery orders warrants imposition of sanctions under Fed. R. Civ. P. 37(b)(2).[7] These rulings do not pass on the merits of respondents' complaint and do not even concern matters of substance, unless the trial process is to be viewed as an end in itself. By this logic, respondents have "prevailed" by compelling petitioners to answer the complaint, to produce thousands of documents in response to discovery requests, and to participate in a trial that continued for 16 months before petitioners' directed verdict motions were granted.

to seek rehearing en banc of the panel's determination, all the defendants below recently filed petitions for rehearing en banc on the "prevailing party" issue. We will advise the Court immediately if the court of appeals takes any action mooting the attorneys' fee issue in the present petition.

[7]Contrary to respondents' assertion (Br. in Opp. 33), petitioners vigorously deny that their responses and those of their trial counsel to discovery requests and orders of the district court were improper or that they warrant the imposition of Rule 37 sanctions. Moreover, the court of appeals has not held that sanctions must be imposed. Judge Swygert would have ordered the district court to impose sanctions (Pet. App. 101a), but Chief Judge Fairchild was willing to join him only in "directing the district court to give consideration to doing so, on remand" (Pet. App. 121a). Judge Pell saw "no necessity for the imposition of sanctions" but joined Chief Judge Fairchild's suggestion "because the case is going back [to the district court] and so that the mandate of this court is clear * * *" (Pet. App. 139a-140a).

Despite all of respondents' baseless assertions and citations, it remains clear that the holding of the court below is contrary to the rule of several other circuits that have addressed the "prevailing party" issue in similar circumstances. Indeed, just prior to the filing of our petition, the Sixth Circuit joined the other courts of appeals that have rejected the Seventh Circuit's approach. In *Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F. 2d 1282 (6th Cir. 1979),[8] the court held that a plaintiff who had succeeded on appeal in having his civil rights claims remanded for a jury trial was not a prevailing party under 42 U.S.C. 1988 and thus was not entitled to an award of attorneys' fees. As the court explained (607 F. 2d at 1283):

> We think that this request [for attorneys' fees] is premature. The plaintiff has indeed prevailed on this appeal, but he has yet to establish that his rights were violated. Until he does, we do not think that the defendants should have to pay his attorney's fees. Otherwise, innocent defendants could end up paying for losing plaintiffs' procedural victories.
>
> We are aware that Congress has authorized the award of attorney's fees *pendente lite* or upon a partial vindication of one's civil rights. *See* Sen. Rep. No. 94-1011 (1976), reprinted at 1976 U.S. Code Congressional & Administrative News pp. 5908, 5912. Here, however, the plaintiff's successful appeal had nothing to do with the merits of his claim.

[8]Although the decision will ultimately appear at the volume and page cited, it is currently reported in the appendix to the paper-bound volume of Federal Reporter 2d for Feb. 18, 1980 (Vol. 8), containing cases to appear in 610 F. 2d and 611 F. 2d.

Finally, respondents contend (Br. in Opp. 87) that the fee award is supported by the "social significance" of their case and the "wide public exposure" of certain documents they received in response to discovery requests. These contentions are without merit. The traditional American rule requires each party to pay its own attorneys' fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Congress varied that rule in the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, but only for those litigants who qualify as "prevailing parties" within the meaning of 42 U.S.C. 1988. Hence, respondents are entitled to a fee award only after they have achieved that status, regardless of how much publicity their litigation generates or how significant it might be in other respects.[9]

2. Respondents charge (Br. in Opp. 75) that our petition "misappl[ies] the rule of *Butz*; compounding the offense by borrowing from the District Court's outlandish 'summary' and otherwise substantially misrepresenting the evidence adduced at trial." They therefore ignore the fact that our basic statement of the evidence (Pet. 10-16) is simply a summary of the evidence that, according to Judge Swygert, the author of the majority opinion for the

[9]Respondents also contend (Br. in Opp. 87 n.*) that "[t]he 'public education function' " they assert is "served" by this litigation "is analogous to that of a plaintiff who is considered a 'prevailing party' under the Freedom of Information Act," 5 U.S.C. 552(a)(4)(E). As the cases cited by respondents make clear, however, the question of the public interest served by a suit under FOIA is separate from the question whether the plaintiff has "substantially prevailed." Attorneys' fees are not automatically awarded in FOIA suits to those who "substantially prevail." The fact that a FOIA suit has served a "public education function" might be justification for awarding fees to a substantially prevailing party, but it is not a ground for awarding them to one who has not prevailed on at least some of his substantive claims. In any event, respondents' right to attorneys' fees is governed by 42 U.S.C. 1988, not FOIA or any other statute.

court of appeals, "provide[s] the basis for a determination of the legal issues concerning the directed verdicts" (Pet. App. 44a). We do not, in fact, agree with Judge Swygert's characterization of much of the evidence. For the reasons set forth in our petition (Pet. 27-32), however, we submit that even if that summary of the critical evidence is accepted as correct, the court of appeals erred under *Butz* v. *Economou*, 438 U.S. 478 (1978), when it reversed the verdicts directed in favor of petitioners.

Respondents rely heavily (Br. in Opp. 5-6, 12-17, 33, 77) on evidence concerning the FBI's counterintelligence program, known as COINTELPRO, consisting of covert actions aimed at various domestic political organizations. But as Chief Judge Fairchild pointed out in his concurring opinion (Pet. App. 120a), the existence of a program to "discredit and hamper [the Black Panther Party] in its political activity" does not prove that petitioners conspired with the state defendants to commit the specific constitutional violations on which the complaint in this case ultimately depends, *i.e.*, to conduct a raid, based on a warrant unsupported by probable cause, with the intent to use deadly force against Black Panther leaders and thereafter to harass the survivors with a malicious prosecution. Nor was the limited authority vested in FBI field offices under the COINTEL program[10] needed to permit petitioners to carry out the tasks of investigating black nationalist groups suspected of engaging in federal criminal activities, using informants in aid of such investigations, and reporting activities that appeared to violate state and local laws to the appropriate state and local law enforcement agencies. A directive

[10]FBI field offices were not permitted to initiate any action under COINTELPRO *"without specific prior Bureau authorization"* (Pl. Exh. 1, page 3 (emphasis in original)).

issued February 2, 1968, from FBI headquarters (Fed. Def. Exh. 10), which implemented a September 14, 1967, memorandum from Attorney General Ramsey Clark to the Director of the FBI regarding criminal offenses "occurring in the course of recent riots" and the possible existence of conspiracies to foment further riots (Fed. Def. Exh. 9, page 1), reminded the field offices to bring any violation of local laws "to the attention of the local police" (Fed. Def. Exh. 10, page 1).[11]

In sum, the FBI's investigation of the Chicago chapter of the Black Panther Party—in particular the Party's stockpiling of firearms—and its sharing of the information gained in the investigation with local law enforcement agencies was conduct responsive to existing law enforcement directives. As we have argued in our petition (Pet. 30-31), the evidence relied on by the court of appeals as creating a jury question whether petitioners went beyond this lawful activity and conspired to commit an illegal entry of the Hampton apartment, to kill occupants of the apartment, and to undertake malicious prosecutions of the survivors, amounts to nothing more than sheer conjecture. Because, as Judge Pell observed in dissent, respondents failed to produce any "hard basic reasonable inference-creating facts" (Pet. App. 153a), the trial judge properly directed a verdict for petitioners. In light of this Court's admonition in *Butz* v. *Economou*, *supra*, the trial judge's order was correct. See also

[11]Both the Attorney General's memorandum and the FBI Director's memorandum listed specific federal criminal statutes relevant to the proposed investigations of black nationalist groups suspected of illegal activity (Fed. Def. Exh. 9, pages 1-2; Fed. Def. Exh. 10, pages 2-3). The Attorney General's memorandum also directed the FBI "to determine the whereabouts of persons who might be involved in instigating riot activity in violation of federal law" (Fed. Def. Exh. 9, page 3).

Pennsylvania R.R. v. *Chamberlain*, 288 U.S. 333, 338-343 (1933). The evidence offered by respondents was simply insufficient to warrant subjecting federal officials such as petitioners to the burden of another trial.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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